May 27, 2008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Barbara Moran

Date of Filing: April 29, 2008

Case Number: TFA-0255

On April 29, 2008, Barbara Moran (Moran) filed an Appeal from a determination that the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE) issued to her. The determination responded to a request for information Moran filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the DOE in 10 C.F.R. Part 1004. This Appeal, if granted, would require the NNSA to release the responsive information it withheld from Moran.

The FOIA generally requires that documents held by the federal government be released to the public upon request. However, Congress has provided nine exemptions to the FOIA which set forth the types of information agencies are not required to release. Under the DOE's regulations, a document exempt from disclosure under the FOIA shall nonetheless be released to the public whenever the DOE determines that disclosure is not contrary to federal law and in the public interest. 10 C.F.R. § 1004.1.

I. Background

On July 27, 2007, Moran filed a FOIA request with the NNSA seeking documents relating to the 1966 collision of a B-52 bomber and a KC-135 tanker over Palomares, Spain (also known as the 1966 Broken Arrow). *See* Determination Letter at 1. In a determination letter, the NNSA stated it contacted the Sandia Site Office, which has oversight for the Sandia National Laboratories (SNL). SNL conducted a search of its records and stated that it identified eight documents responsive to Moran's FOIA request. However, the NNSA withheld portions of three of the documents pursuant Exemptions 2 and 6 of the FOIA. *Id.*

On April 28, 2008, Moran filed the present Appeal with the Office of Hearings and Appeals (OHA). In her Appeal, Moran challenges the withholding of information under Exemptions 2 and 6 of the FOIA. *See* Appeal Letter. Moran asks that the OHA direct the NNSA to release the withheld information.

II. Analysis

A. Exemption 2

In its determination letter, NNSA withheld specific assessment information on contamination under Exemption 2. The courts have interpreted Exemption 2 to encompass two distinct categories of information: (a) internal matters of a relatively trivial nature ("low two" information); and (b) more substantial internal matters, the disclosure of which would risk circumvention of a legal requirement ("high two" information). *See, e.g., Schiller v. NLRB*, 964 F.2d 1205, 1207 (D.C. Cir. 1992). The information at issue in the present case involves only the second category, "high two" information. The courts have fashioned a two-prong test for determining whether information can be exempted from mandatory disclosure under the "high two" category. Under this test, first articulated by the D.C. Circuit, the agency seeking to withhold information under "high two" must be able to show that (1) the requested information is "predominantly internal," and (2) its disclosure "significantly risks circumvention of agency regulations or statutes." *Crooker v. ATF*, 591 F.2d 753, 771 (D.C. Cir. 1978 (en banc).

As an initial matter, it is important to note that the documents at issue are agency records. Although they are located at SNL, they are agency records for purposes of the FOIA because the records were "obtained" by the DOE and were under DOE's control at the time of Moran's request.

We have reviewed the responsive information withheld under the "high two" exemption and find that the information deleted from the document relates to specific assessment information on contamination, including "assumptions, track records, transportation and lessons learned". This information is predominantly internal in nature because it is not intended for dissemination outside the DOE and "does not purport to regulate activities among members of the public." *See Cox v. Department of Justice*, 601 F.2d 1, 5 (D.C. Cir. 1979). The NNSA has stated that release of this information "could benefit adversaries by helping them identify possible vulnerabilities, as well as provide them the opportunity to target facilities." In addition, the NNSA has contended that disclosure of this information significantly risks circumvention of statutes and agency regulations created to secure DOE's facilities. We agree. DOE has a legislated duty to protect its facilities and assets. Accordingly, we find that this information in the responsive document can be properly withheld under the "high two" prong of Exemption 2.

The DOE regulations, at 10 C.F.R. § 1004.1, provide that "the DOE will make records available which it is authorized to withhold under [a FOIA exemption] whenever it determines that such disclosure is in the public interest." Therefore, although we have determined that the deleted information is protected under Exemption 2, we must address whether disclosure of this information is in the public interest. We find that it is not.

As discussed above, the information deleted from the responsive document relates to assessment information on contamination. The disclosure of this information would reveal agency determinations on practices taken to protect the safety of DOE and its facilities. Clearly, disclosing

such information is not in the public interest as this information could render DOE personnel and facilities vulnerable.

B. Exemption 6

In its determination letter, NNSA withheld the names of contractor employees from a responsive document under Exemption 6. Exemption 6 shields from disclosure "[p]ersonnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C.§ 552(b)(6); 10 C. F. R. § 1004.10(b)(6). The purpose of Exemption 6 is to "protect individuals from the injury and embarrassment that can result from the unnecessary disclosure of personal information." *Department of State v. Washington Post Co.*, 456 U.S. 595, 599 (1982).

In order to determine whether information may be withheld under Exemption 6, an agency must undertake a three-step analysis. First, the agency must determine whether a significant privacy interest would be invaded by the disclosure of the record. If no privacy interest is identified, the record may not be withheld pursuant to this exemption. *Ripskis v. Department of HUD*, 746 F.2d 1, 3 (D.C. Cir. 1984) (*Ripskis*). Second, the agency must determine whether release of the document would further the public interest by shedding light on the operations and activities of the government. *See Hopkins v. Department of HUD*, 929 F.2d 81, 88 (2d Cir. 1991)*; Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989); *FLRA v. Department of Treasury Financial Management Service*, 884 F.2d 1446, 1451 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990). Finally, the agency must weigh the privacy interests it has identified against the public interest in order to determine whether the release of the record would constitute a clearly unwarranted invasion of personal privacy. *Reporters Committee*, 489 U.S. at 762-770. *See generally Ripskis*, 746 F.2d at 3.

1. Privacy Interest

The NNSA determined that there was a privacy interest in the identities of contractor employees. We have consistently determined "that there is a real and substantial threat to employees' privacy if personal identifying information . . . were released." *Painting & Drywall Work Preservation Fund, Inc*., 15 DOE ¶ 80,115 at 80,537 (1987). *See also Painting & Drywall Work Preservation Fund, Inc*., 16 DOE ¶ 80,102 at 80,504 (1987); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,120 at 80,569 (1985); *International Brotherhood of Electrical Workers*, 13 DOE ¶ 80,104 at 80,519 (1985). The same type of privacy interest is involved in this case. In fact, because the contractor employees whose names are sought are non-federal employees, but work for a private entity under contract with the government, there is a significant privacy interest in maintaining their confidentiality. If this information were disclosed to the requester, the disclosure could "cause inevitable harassment and unwarranted solicitation." *See* Determination Letter at 2. We have previously found the potential for harassment of individuals to be sufficient justification for withholding information under Exemption 6. *See, e.g., William Hyde*, 18 DOE ¶ 80,102 (1988). These considerations govern our determination. We therefore find a real and substantial privacy interest in the names of the contractor employees.

2. Public Interest in Disclosure

Having established the existence of a privacy interest, the next step is to determine whether there is a public interest in disclosure. The Supreme Court has held that there is a public interest in disclosure of information that "sheds light on the operations and activities of the government." *Reporters Committee*, 489 U.S. at 773. *See Marlene Flor*, 26 DOE ¶ 80,104 at 80,511 (1996). According to the NNSA, "release of this information would not shed light on the operations of the federal government, as the Sandia Corporation is not a government agency, but a private [entity] under contract which provides a variety of important, and sometimes vital, goods and services to the federal government." Determination Letter at 2. The requester has the burden of establishing that disclosure would serve the public interest. *Flor*, 26 DOE at 80,511 (quoting *Carter v. Department of Commerce*, 830 F.2d 388 (D.C. Cir. 1987)). We fail to see how release of the identities of the contractor employees in the present case would inform the public about the operations and activities of Government. Accordingly, we find that there is little or no public interest in disclosure of the contractor employees' names.

3. Balancing the Interests

As stated earlier, there is a significant privacy interest in this information. In determining whether the disclosure of the identifying information could reasonably be expected to constitute an unwarranted invasion of personal privacy, courts have used a balancing test, weighing the privacy interests that would be infringed against the public interest in disclosure. *Reporters Committee*, 489 U.S. at 762 (1989). We agree with NNSA and find that the minimal public interest here is far outweighed by the real and identifiable privacy interests of the contractor employees.

It Is Therefore Ordered That:

(1) The Appeal filed by Barbara Moran on April 29, 2008, OHA Case No. TFA-0255, is hereby denied.

(2) This is a final order of the Department of Energy of which any aggrieved party may seek judicial review pursuant to the provisions of 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: May 27, 2008